

SUMMARY OF CONSULTATION RESPONSES ON BSB GOOD PRACTICE  
GUIDANCE

CERTIFICATION REGIME: REGULATORY REFERENCES

SEPTEMBER 2019

## Introduction

### About this document

The document sets out a summary of the responses we received to our consultation on draft good practice guidance on receiving and issuing regulatory references. The draft good practice guidance and the covering consultation paper are available on the BSB website<sup>1</sup>.

The BSB invited comments on the proposed good practice guidance and asked four specific questions.

1. Does the guidance succeed in its aim of providing a framework for firms seeking to implement regulatory references fairly, proportionately and consistently? If not, why not?
2. Does the guidance help firms judge the degree of detail that it would be appropriate to disclose in a reference about an individual's conduct history? If not, why not?
3. (For regulated firms) Would the guidance have practical application in your firm? How would you use it? If not, why not?
4. We are considering adding a fourth principle to our stated list of three (i.e. fairness, proportionality and consistency). In line with our stated purpose to help raise standards of behaviour and competence in the UK banking sector, we believe that it could be beneficial to include an overarching principle which relates to complying with the spirit as well as the letter of the regulation (i.e. its aim of seeking to reduce the risk of damage (financial, legal, or reputational) to firms arising from the potential actions of individuals in risk-taking roles and with a history of misconduct). Our guidance seeks to provide examples of how firms could do this, but we think making it more explicit could be useful in aiding decision making in firms as new and emerging issues arise. Do you agree? If not, why not?

The consultation period ran from 30 January 2019 to 20 March 2019, and the consultation document was published on our website and shared with member firms, trade associations, professional bodies, consumer organisations and professional services firms. As the consultation period was shorter than for previous consultations on BSB good practice guidance, we offered some stakeholders a short extension to the deadline.

### Responses to the consultation

We received 7 responses to our consultation from a range of firms and organisations, as described in Table 1.

**Table 1**

Organisation type	Number of responses
BSB member firms	5
Chartered professional bodies	1
Trade associations	1

We have also received informal feedback on a pre-consultation version of the guidance from two regulators.

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<sup>1</sup> <https://www.bankingstandardsboard.org.uk/bsb-consultation-good-practice-guidance-on-regulatory-references-2/>

We are grateful for all the responses received to the consultation. This document summarises the key issues and themes of the responses, which have also been discussed with members of the BSB's Certification Regime Working Group (CRWG). It also explains where and how these points have been reflected in the final guidance.

## Summary of the consultation responses

We are grateful for the many constructive responses we received to this consultation, all of which have helped us make the guidance clearer and more accessible and useful. Overall, the feedback was that the guidance strikes the right tone and succeeds in its aim of providing a framework for firms seeking to implement regulatory references fairly, proportionately and consistently. The feedback we received helped us clarify our wording in a number of areas, but no response suggested significant changes to the tone of the guidance. In response to the consultation paper's questions on the degree of detail that it would be appropriate to disclose in a reference about an individual's conduct history and the practical applicability of the guidance, the key areas of comment related to:

- the structure of the guidance;
- usefulness of the guidance;
- more detail on what to include in Box G in the FCA's template;
- worked examples and more detail/granularity;
- data protection and security;
- receiving a request for a reference;
- addition of a fourth principle;
- what to include in a reference;
- challenges when seeking comment from employees; and
- regulatory action and litigation against the firm providing the reference.

### Structure of the guidance

The responses to our consultation agreed that the guidance covered all the relevant types of challenges and issues relating to regulatory references. Some respondents, however, suggested that moving the principles for providing, revising and using regulatory references (currently described in annex A) to the front of the document would aid usability.

For similar reasons, we have also reorganised guidance so that the more detailed, process driven guidance now follows on from the high-level principles.

### Usefulness of the guidance

One response highlighted that firms that have been within the scope of the Senior Managers and Certification Regime (SM&CR) since its inception are likely already to have processes in place that are in line with the BSB's guidance. We recognise this and would also add that, while it is important to have processes in place, it will be necessary to keep these under review to ensure they remain fair and proportionate and promote consistency.

Some respondents noted the extension of the regime to solo-regulated firms, which commences in December 2019. While the BSB's guidance was developed in the context of certified employees in banking institutions, it may also be helpful for firms that are new to the regime, and especially those with less extensive human resources capacity.

## More detail on what to include in 'Box G' in the FCA's template

One respondent requested more detailed guidance on the use of 'Box G'<sup>2</sup> in the FCA's template to promote consistent application of the regulatory reference rules across firms, covering for example:

- the misconduct threshold for disclosure;
- in what circumstances it is expected that firms should consider misconduct serious enough to look back further than the six-year limit; and
- the level of detail to be included.

We agree that these are important questions that go to the heart of the regime. However, our guidance takes a principles-based approach and specific thresholds will depend on a firm's risk appetite. Detailed guidance on specific thresholds and other practical aspects of the type suggested, should also be informed by experience of the regime in practice. As such, we would suggest that this proposition be revisited at a later date, when firms have a sufficient number of examples that can be analysed and shared on an anonymised basis, and provide the evidence base as appropriate for more detailed guidance.

We agree that Box G in the FCA's template is an important tool that provides firms with an opportunity to share and receive information on issues that demonstrate an individual's lack of F&P. We have therefore updated the introduction to section 4, 'The type of information to include in a reference,' to explain that firms should aim to describe an issue with at least enough detail for a receiving firm to be able to understand how it may bring into question an individual's F&P.

## Worked examples and more detail/granularity

Several responses to our consultation suggested that the guidance could provide more detail and granularity in its examples of the types of challenges firms face in different scenarios and the solutions to such challenges. This was seen as particularly the case where firms deal with unverified information when an employee leaves before a disciplinary process can be completed. There was also a suggestion to include more detailed guidance on how firms should approach disciplinary processes where the relevant misconduct is pertinent to fitness and propriety.

However, as one respondent pointed out in relation to incomplete disciplinarys, more detailed guidance is difficult to provide as firms will have different risk appetites. As described in the introduction to the good practice guidance, its main purpose is not to prescribe specific processes and policies, but rather to provide principles against which firms can evaluate the outcomes of their own policies and processes. We have not therefore provided more detail in response to this suggestion, though will of course keep this under review.

## Data protection and security

It was suggested that the BSB should provide more detail on some of the issues covered in section 2.4, 'Data security'. Specifically, the guidance could explore how firms can reconcile obligations of good recordkeeping under the SM&CR with some of their legal obligations under the General Data Protection Regulation (GDPR), such as the right to be forgotten, the right to rectification, and data minimisation.

The guidance acknowledges that firms will need to consider their responsibilities under GDPR, such as data minimisation, when observing requirements such as giving full and accurate information of

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<sup>2</sup> SYSC 22 Annex 1, Question G ("Are we aware of any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper?")

relevance to an individual's F&P, and with more general principles such as transparency of process. The guidance also highlights some situations in which due consideration to data protection is required, e.g. when revising a reference (where firms need to make sure they do not release personal information to a firm that no longer employs the former employee).

Each firm will have developed its own policies and procedures to support compliance with GDPR; this will vary from business to business, given different operating models and risk appetite. As noted above, the BSB's good practice guidance is intended to provide principles against which firms can evaluate the outcomes of their own policies and processes. We have not, therefore, revised the guidance to reflect this suggestion at this stage, though will again keep this under review.

### Receiving a request for a reference

Feedback from three respondents suggested that the guidance sufficiently describes the types of challenge firms may face when making decisions about how to handle reference requests. The guidance also provides realistic and useful examples of how the principle of proportionality can be applied.

Different opinions emerged, however, on what constitutes good practice when investigating the legitimacy of a request for a reference. One respondent explained that it would often require disproportionate effort and resource to go through the measures to verify the legitimacy of a third-party supplier's request for a regulatory reference, as suggested by our guidance. They noted that this could also affect a firm's ability to provide a regulatory reference within the suggested 6-week period. Another respondent suggested that the guidance correctly focuses on the legitimacy of a request and the need to take reasonable steps, but that these must also adhere to the principle of proportionality.

One respondent noted that issues around illegitimate reference requests – particularly when they are used by third third-party suppliers to conduct research into a potential candidate without having a definite job offer (so-called 'fishing trips') – may be at least partially addressed by the FCA's Financial Services Directory.<sup>3</sup> This Directory is due to be introduced in March 2020 and will include details of regulatory prohibitions or sanctions.

We believe it is important for firms to take steps to confirm the legitimacy of a request in order to ensure that sensitive data is not shared incorrectly. As such, we have retained the guidance on this point unamended. However, to ensure that a reference can still be prepared in a timely manner, the guidance now suggests initiating any due diligence efforts early and performing them in parallel to the collation of a reference.

### Addition of a fourth principle

In our consultation we asked for views on adding a fourth principle to those relating to fairness, proportionality and consistency. This additional principle would relate to meeting the spirit as well as the letter of the regulation, i.e. the regulation's aim of seeking to reduce the risk of damage (financial, legal, or reputational) to firms arising from the potential actions of individuals in risk-taking roles and with a history of misconduct.

Some respondents to our consultation supported adding a fourth principle. One respondent argued, however, that firms already err on the side of providing more rather than less information in cases of

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<sup>3</sup> <https://www.fca.org.uk/news/press-releases/fca-introduces-final-rules-directory-financial-services-workers>

doubt (with caveats where appropriate) and suggested that inclusion of a fourth principle would risk encouraging over-disclosure by firms, potentially at the cost of fairness to employees.

Having reflected further on this question we have – rather than adding a fourth principle – underlined the importance of meeting the spirit of the regulation both within the existing three principles and in the introduction to the guidance. On proportionality, for example, we have clarified that this principle is not about easing the administrative burden of implementation on firms, but about ensuring that firms put appropriate time and effort into collating and interpreting regulatory references to ensure that the industry as a whole obtains the greatest benefit from regulatory references. Similarly, when considering the principle of fairness, due consideration should be given to whether the action is fair to the relevant employee and also to the industry as a whole; firms should weigh up the risk of damage (financial, legal and reputational) to the sector arising from the potential actions of individuals in risk-taking roles and with a history of misconduct, and the risk of damage to an individual from over-disclosure.

One respondent suggested that the guidance could more clearly highlight that a fair reference reduces the risk of litigation against the providing firm. While this is already noted elsewhere (e.g. in section 4.2. ‘References contain adverse information about an individual’), we have updated the introduction of the document to reflect this point.

### What to include in a reference

One respondent suggested exploring the possibility of providing more data and information in a reference than is required by the regulation. More information could, for example, be provided on the nature of career breaks and on what individuals have done to maintain and demonstrate their fitness and propriety during such breaks. Likewise, firms could include additional adverse information about an individual from a third party such as a professional body.

While this approach would undoubtedly provide a more detailed picture of an individual’s history, it may be disproportionate for firms to verify such information in way that is fair (ensuring, for example, that the individual has had a chance to comment on the initial issue and, if not, giving them the opportunity to do so) and consistent which may become more difficult as more information is drawn from external sources). Encouraging disclosure of such additional information might also create the impression that individuals ought to justify career breaks and that the same level of continuous professional development is required of those who are on a career break and those who are not. We have therefore not revised the guidance in this regard.

### Challenges when seeking comment from employees

One respondent suggested that individuals should be informed at the beginning, not the end, of a disciplinary process that the outcome of the investigation will be included in a regulatory reference. This has been reflected in the updated guidance.

We also received a number of responses relating to the challenges that firms may face in giving employees the opportunity to comment on the content of regulatory references.

- One respondent noted that giving an ex-employee a chance to comment on information going into a revised reference (i.e. when new information comes to light about that individual) may present the firm with a difficult judgement to make, if this entails new but confidential information being shared with the individual. This is because former employees will not be bound by the same confidentiality requirements as those with current

employment contracts or non-disclosure agreements in respect of information learnt following the termination of their employment.

- It may be particularly challenging to ensure a fair and proportionate approach when seeking comment from former employees. One respondent raised concerns about contacting an ex-employee to give them a second opportunity to comment on past disciplinary action, when the individual had not taken up the opportunity to do so previously (or may not have been made aware at the time that their comment might inform the content of a regulatory reference). Even though the guidance recommends that firms need to be clear that any such subsequent invitation to comment would not re-open the original proceeding, the respondent highlighted that the time required to manage such a process could be significant.
- The respondent also highlighted that inviting comment from an employee on an allegation that was going to be included in a revised regulatory reference could create the false impression that the misconduct might not be included in the reference, whereas the firm would remain obliged to provide the information (albeit with fair consideration of the ex-employee's comment).

While these concerns are valid and raise practical issues, good practice remains, however, that firms should make every effort to ensure that employees are treated fairly and receive a chance to comment on the content of a regulatory reference.

Another respondent pointed out that firms have no control over former employees and are unable to compel them to participate in investigations after the fact. Conducting investigations without input from a former employee carries with it a risk of unfairness to the former employee. That is, however, a risk that the former employee chooses to take if they decide not to engage; the responsibility of the firm is to offer that opportunity (and, of course, to explain properly the implications of not participating in the process).

It was also suggested that firms could use an updated reference to explain (e.g. in Box G of the FCA's template) that they were unable to reach the individual for comment or that the employee had declined to comment. We agree that this would facilitate a fair process by providing the receiving firm with information that allows appropriate follow-up with the employee, and have updated section 4.5 'Revising a regulatory reference' accordingly.

### **Regulatory action and litigation against the firm**

One respondent suggested that the guidance could provide more detail on the range of acceptable approaches where firms provide a reference, when:

- regulatory action is in progress or is threatened against a firm; or?
- there is actual or potential litigation against the firm by a departing or former employee.

While clearly important to firms, these are issues which will normally require legal advice, so have not been addressed in this good practice guidance.

### **Next steps**

We will keep the contents and relevance of the BSB guidance on *Certification Regime: Regulatory References* under review and would welcome ongoing feedback on its usefulness, as well as additional illustrative examples that could be included in future guidance.

For more information on this or any other areas of the BSB's work, please contact [certification@bankingstandardsboard.org.uk](mailto:certification@bankingstandardsboard.org.uk).

