

Summary of the FCA/PRA final rules on regulatory references

September 2016

1. Executive Summary

The FCA and the PRA have published their final rules on requesting and giving regulatory references as part of the assessment of potential new recruits as fit and proper under SMCR. The new rules will come into force on 7 March 2017. This note is a high-level summary of the details included in the rules. Key points to note are:

- *References to cover the past 6 years* – Full scope regulatory reference firms must take reasonable steps to request appropriate references in respect of potential recruits in certain functions for the past 6 years, from current and former employers, whether or not PRA/FCA regulated and including from overseas entities.
- *Matters to be disclosed* – Full scope regulatory reference firms must disclose breaches of the PRA Conduct Rules, FCA Conduct Rules, Conduct Standards and Statements of Principle and Code of Practice For Approved Persons (APER) if such breaches result in *disciplinary action*. Disciplinary action is limited to the issue of a formal written warning, suspension or dismissal or the reduction or recovery of any of the candidate's remuneration because of a breach. There is no requirement to disclose a suspension imposed pending an internal investigation rather than as a disciplinary sanction. These firms must also disclose all information relevant to the recruiter's assessment of a candidate's fitness and propriety. Both types of disclosure must be made on a prescribed template. FCA-authorized firms are only required to disclose all relevant information and there is no prescribed template on which to do so.
- *Look-back period of 6 years* – When giving a reference the look-back period for disclosures is 6 years from the date the reference is requested.
- *Updating references* – firms that give a reference have an obligation to update it in respect of matters coming to light in the six years from the date the individual's employment terminates. The obligation only applies where the firm to whom the original reference was given is still the current employer of the individual and full scope or FCA-authorized. The obligation applies to matters that occurred in the six years prior to termination, unless the matter is a serious matter in which case no time limit applies.
- *The table below taken from the PRA Policy Statement is a useful summary of the different rules applying to full-scope regulatory reference firms and FCA authorised firms.*

Requirement	Banks and insurers	Small non-directive insurance firms	FCA only- authorised firms
Provide a reference upon request in relation to candidates of the following roles: SMFs, SIMFs, CFs, Certification Functions, Key Function Holders and Notified NEDs	YES	YES	YES
Request references going back six years	YES	NO	NO
Include mandatory information in the reference (going back six years)	YES	NO	NO
Include all relevant information in the reference (going back six years, unless serious when there is no time limit)	YES	YES	YES
Provide the reference in a mandatory template	YES	NO	NO
Update reference if appropriate, six years following resignation (including any notice period served)	YES	NO	NO

2. When do the new rules come into force?

7 March 2017. But there will be a transitional period before then.

3. Application of the new rules

- Banks, building societies, credit unions, PRA-designated investment firms (including overseas CRR firms in relation to the activities of their establishments in the UK), Solvency II firms, the Society of Lloyd's, UK ISPVs and large NDFs must request and provide references using the mandatory reference template. These are known as full-scope regulatory reference firms.
- Other FCA-authorised firms and small non-directive insurance firms are not required to request reference information in accordance with the rules (but are still likely to request information to satisfy themselves of the fitness and propriety of individuals).
- Other FCA-authorised firms and small non-directive insurance firms must provide a reference on request in accordance with the rules (there is no requirement for these firms to use the mandatory reference template).

4. The obligation to request references

4.1. Obligation

The obligation is to take reasonable steps to obtain appropriate references.

4.2. Relevant functions

The obligation to request and provide references applies in respect of candidates for Senior Management Functions, Certification Functions, Senior Insurance Management Functions, Key Function Holders or FCA Controlled Functions and Notified non-executive directors.

4.3. Time period

References should be requested to cover the past 6 years.

4.4. Organisations from which references should be requested

- All current or former employers or organisations at which the candidate has served as a non-executive director (including those based overseas and irrespective of whether or not the employer/organisation is regulated by the FCA/PRA).
- But there is no need to seek references from employers within the same group as the new employer, provided the new employer has access to the same information sources as the current or former group employer to assess fitness and propriety.

4.5. Timeframe for making requests

- In respect of Senior Management or FCA/PRA controlled function application, ideally before the application is made but no later than one month before the end of the application period.
- Where a reference request would require the requesting entity, other employer or any other person to make a public announcement, references can be obtained at any time during the application period.

5. The obligation to provide references

5.1. What must be provided?

5.1.1. Mandatory information

- Full-scope regulatory reference firms must disclose breaches of the PRA Conduct Rules, FCA Conduct Rules, Conduct Standards and Statements of Principle and Code of Practice For Approved Persons (APER) if they result in *disciplinary action*. This applies irrespective of whether the requesting firm is a full-scope regulatory firm.
- *Disciplinary action* for these purposes has the same meaning as in S64C(2) of FSMA (this change to the previous rules follows changes made to FSMA). It is the issue of a formal written warning, suspension or dismissal or the reduction or recovery of any of the candidate's remuneration because of a breach. There is no requirement to disclose a suspension imposed pending an internal investigation rather than as a disciplinary sanction.

5.1.2. 'All relevant information'

- Full scope regulatory reference firms must also provide all additional information that the reference provider considers to be relevant to the requester's assessment of whether the candidate is fit and proper. This applies whether or not the requesting firm is a full-scope regulatory firm. This section can also be used to provide additional information relevant to the disclosures in the mandatory section, for example, mitigating circumstances.

- FCA-authorised firms that are not full scope regulatory reference firms must provide all information that they consider to be relevant to the requester's assessment of whether the candidate is fit and proper.
- The rules set out the minimum requirements for regulatory references. Firms are not prevented from including more than is required, subject to other legal requirements.
- There is no obligation to disclose information that has not been properly verified. For example, pending disciplinary proceedings, in circumstances where the individual left before conclusion. But a firm may choose to disclose this information.

5.1.3. Employee's responsibilities

- There is no requirement to provide details of an employee's responsibilities in the reference template. This is a change from the previous draft.

5.1.4. Format

- Full-scope regulatory reference firms must use the regulatory reference template for both types of information.
- Edits can be made to the template provided they do not affect what has to be disclosed under the rules.

5.1.5. Period reference should cover

- The six years before the request for a reference.
- The period from the date the reference is requested up to the date the reference is given.
- Serious matters that have occurred at any time (Guidance is provided as to what constitutes a serious matter).

5.2. When should the reference be provided?

The FCA have included guidance that regulated firms providing references should normally do so within 6 weeks.

5.3. What else needs to be considered?

- A duty of care is owed by the firm giving the reference to both the recipient and the employee, to exercise due skill and care in its preparation.
- The FCA rules give guidance on what the requirement of fairness will usually require, including the example that fairness will normally require a firm to have given an employee an opportunity to comment on information in a reference. But there are no specific rules on this.
- No duty is imposed on firms by the rules to investigate alleged misconduct and there is no requirement to open investigations before an employee leaves, although this is included as a recommendation.

6. Obligation to update references

As well as providing a reference when requested, full-scope regulatory reference firms (but not other FCA-authorised firms) have an obligation to update the reference if necessary.

6.1. Matters to which updating obligation applies

- Any matters that occurred in the 6-year period before the date the original reference was given, which the firm subsequently becomes aware of, that mean it would have drafted the reference differently, and the difference is significant for an assessment of the fitness and propriety of the individual.
- No limitation period applies to serious matters (ie updating is still required if a firm discovers something that occurred 8 years before it gave the original reference).
- There is no obligation to disclose information that has not been verified (for example, negative information received in a reference from another employer).

6.2. Period in which updating obligation applies

- Any notice period served between the original reference being provided and the individual leaving a firm.
- The six-year period starting from the date when the individual's employment with the firm ends.

6.3. Organisations who must be updated

- Only those employers/organisations to whom the firm has given a reference who are full scope regulatory firms or FCA authorised *and* who currently employ the individual.
- There is no obligation to update an organisation if the firm makes reasonable enquiries but still does not know if the organisation currently employs the individual.

7. Record-keeping

Records must be kept for at least six years to enable firms to comply with the requirements of the rules on regulatory references.