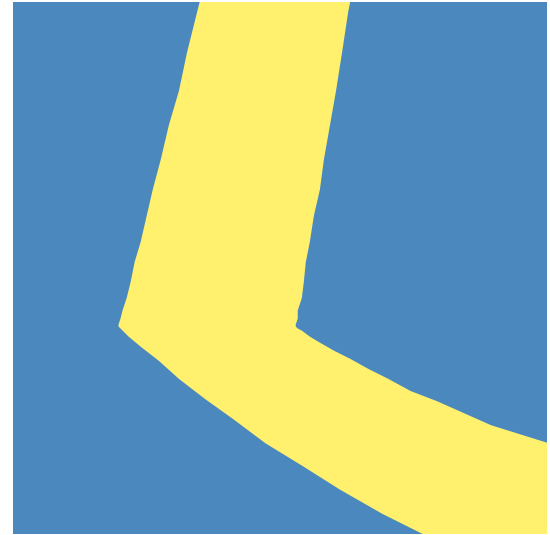




# Employment issues

Financial services industry



## **Summary**

This client guide provides a summary of the key employment issues for the financial services industry as well as practical ways of resolving the conflict between the regulatory and employment law requirements.

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## **Introduction**

### **Approved persons: the impact of the concept of 'fit and proper' on the employment relationship**

The concept of fitness and propriety with its three main strands of: honesty, integrity and reputation; competence and capability; and financial soundness, affects the employment relationship in a number of ways. As an employer, it is important to remember that an employee who makes a mistake does not necessarily act in breach of the concept unless one or more of the three strands is broken. Looked at sequentially through the progress of the employment relationship the concept impacts on the following processes.

#### **Recruitment**

On the vetting and checks that are carried out at the time of recruitment.

#### **Training and assessments**

On the provision of training during the employment relationship and on the performance appraisal process.

#### **Investigations**

It impacts upon both how the employee is treated during an investigation and what is done with that employee following an investigation.

#### **Notifications**

It determines what information the authorised firm has to notify to the Financial Services Authority (FSA) regarding the employee's actions on Forms C (Notice of ceasing to perform controlled functions) or D (Notification of changes in personal information or application details).

#### **Disciplinary action and terminations**

It impacts upon the way that the disciplinary process is documented and progressed and upon the way that settlement documentation is drafted.

#### **References**

Finally, the concept of fitness and propriety impacts upon the form of any reference that the employer can give for the employee.

Failure to have regard to the requirements of the Financial Services and Markets Act 2000 (FSMA) regarding any of these stages will potentially lead the authorised firm to being in breach of its own obligations to the FSA, and also expose the firm to risk of litigation from the employee with all the consequent risks publicity poses to the firm's reputation.

## **Recruitment**

The obligations on the regulated employer commence at the time of recruitment because, if the regulated employer wishes to employ an individual to carry out a controlled function, or that individual is a senior manager having significant influence, then approved person status must be obtained. The regulated employer cannot permit that individual to carry out any of those controlled functions until they have been approved as fit and proper for that purpose by the FSA.

### **Form A**

The application for approved person status is made on Form A, which requires a considerable amount of information. It is the responsibility of the prospective employer to submit the application, and reckless submission of inaccurate or misleading information is a criminal offence.

Wide-ranging checks are needed pre-employment. These should be explained to the prospective employee and specific written consent should be obtained from the employee to ensure compliance with the Data Protection Code (the DP Code) and to allow the employer to undertake various credit checks, court proceedings and criminal checks. The only way that an employer can obtain details of all past convictions including spent convictions is to require the employee to make a joint request with the employer to the Criminal Records Bureau.

References should also be sought from previous employers and many financial institutions have developed a standard form of questionnaire that usually flows directly from the questions on the Form A application itself.

Part 1 of the DP Code deals with recruitment and selection and obliges employers to tailor their investigations into a candidate's personal data and to be proportionate and necessary. Every search or question must be proportionate and justifiable. Access to sensitive data must be restricted and kept in a secure place.

Although the DP Code also provides that pre-employment vetting should be limited so far as possible in the case of an approved person, the regulatory requirements will override the guidance in the DP Code.

Once the employee has been recruited, Part 2 of the DP Code comes into play regulating the maintenance of employee records. One aspect of FSMA that directly contravenes the guidance in the DP Code, is that the FSA has the right to ask an employer for all spent warnings on an employee's disciplinary record.

This may cause problems because most company policies provide that disciplinary warnings will be spent or disregarded after a certain period, typically after 12 months, provided the employee has not reoffended. The DP Code provides that spent warnings must be destroyed. However, if the employee is an approved person the employer should keep the record of spent warnings on a separate file in case the FSA requests this information.

If an employer were to destroy spent warnings then this is likely to prejudice the quality of disclosed information to the FSA that could result in an inaccurate disclosure.

Record keeping is very important in the case of approved persons, to ensure that all checks carried out at the recruitment stage are tracked and verified to avoid any claims that this was not done properly in the first place. It will also be necessary for the HR and compliance departments to liaise when a reference request is received from a prospective regulated employer.

### **Contract of employment**

#### **Offer**

The offer of employment and the employment contract itself should state that any statement of misleading or inaccurate information made to the FSA at the time of the application by the employee is grounds for instant dismissal. Any offer of employment must be conditional upon the candidate being deemed fit and proper by the FSA.

#### **Contract**

The employment contract should incorporate the FSMA regulatory regime and the terms governing the conduct of approved persons, by making it a term of the contract that the employee must comply with regulatory requirements. There should also be an express statement that a breach of the FSA rules and/or loss of fitness and propriety can justify summary dismissal.

The contract should also contain an express right to suspend the employee should any breach of FSMA rules be suspected. This is to ensure that the individual can be removed immediately from carrying out that controlled function or functions while the investigation takes place. The normal disciplinary process of several warning stages and a period for improvement is not going to be appropriate where the employee is suspected of misconduct in carrying out a controlled function.

The fact that the FSA may require information regarding expired disciplinary warnings should be expressly referred to in the contract.

In describing the role and duties of the employee it will be advisable to have a view as to what senior management responsibilities he may be going to carry out, and to amend this description as new responsibilities are taken on. This ensures that the employee's obligations under the contract reflect the obligations and duties he is required to carry out, preventing dispute at a later stage.

### **Avoiding disputes**

Various steps can be taken including the following.

#### **Control of interview notes**

There should be strict control of the interview notes and recruitment documentation to ensure that they comply with the Data Protection Act 1998 (the DP Act) and evidence by paper trail that the authorised firm has complied with its regulatory obligations in carrying out necessary checks on the candidate.

#### **Obtain necessary consents**

The employer must obtain all the necessary consents to make the wide-ranging checks that it is obliged to carry out under the FSMA regime, otherwise the employer will be in breach of the DP Act.

#### **Consistent selection criteria**

The selection criteria for the candidates should be consistent and applied in accordance with Equal Opportunities Commission guidance to avoid any claims of discrimination.

#### **Conditional offer**

The offer made to the candidate should be conditional upon approved person status being achieved.

#### **Comply with DP Act**

To comply with the DP Act the HR and compliance departments should ensure that they have a retention policy setting a time limit for retention of records with particular view to spent warnings relating to approved persons that may have to be disclosed to the FSA.

File storage should also be structured to ensure that if legal advice has been taken on an employee's recruitment, then this is stored separately from the personal data on the HR file. In addition, if personal data is stored in the compliance department then the HR function should be aware of that information and its content.

There is always a risk of a firm receiving a subject access request served by a former employee. This can cause problems if documentation control procedures for the storage of information have been lax.

## **Training and competence**

### **Training**

During the contract of employment the employer is obliged to ensure that any person carrying out controlled functions is competent and remains so.

Therefore there is an obligation on the employer to regularly review the competence of approved persons employed by it, assess their training needs and provide any necessary training.

If an employer believes that an employee's competence falls below acceptable levels then it is not permitted to allow that person to continue to engage in any regulated activity. It is essential therefore that the employer does reserve the right to remove that individual immediately from regulated activities if there is a concern about his competence.

The employer also needs to have the power to oblige the individual to engage in and successfully conclude whatever training the employer considers necessary to ensure that the relevant standards of competence are met.

If there is a requirement to pass certain examinations within a specified time then this obligation should be reflected in the employment contract so that if the employee fails to meet those requirements he can be dismissed.

Records should be maintained by the employer to ensure that it can meet any complaint either from an employee or from the FSA that competence training was inadequate. These records should be held and co-ordinated by the compliance department but a copy of the training records should ideally be held on the HR file of the individual employee.

### **Performance management**

It is crucial to be able to spot a situation where an employee is under-performing in carrying out a controlled function. Inclusion of clear obligations on the employee in the employment contract to maintain competence will assist the employer in demonstrating that it has acted reasonably in using performance failure as a ground for suspension and subsequent dismissal.

The employer is obliged to monitor both the employee's competence and maintain that competence throughout his employment. Consequently, managers should be encouraged to conduct candid and realistic performance assessments. If an assessment should call into question someone's competence then the employer who fails to take action will lay itself open to criticism from the FSA, particularly

if an individual's incompetence causes a regulatory lapse or loss to a client.

It is also essential to have the power to move an employee away from a regulated duty if there is any concern about his performance. Without that express power the employee may be able to claim that there has been a lack of procedural fairness in that he should have received a series of warnings and time to improve.

HR professionals and managers must ensure that appraisals highlighting problems are followed up promptly and are well documented. There should also be periodic audits of training records for approved persons to make sure that they continue to have the necessary skills.

If a complaint is received either from the FSA or from the employee regarding the adequacy of training, it will be necessary to check the contract of employment, employee handbook, individual's training record and the firm's procedures for training to establish whether or not there has been a breach. Adequacy of training also impacts on the firm's position where there is an FSA investigation.

## **Discovering a problem: anticipating an FSA investigation?**

A firm must deal with its regulators in an open and co-operative way and must disclose to the FSA anything relating to the firm of which the FSA would reasonably expect notice (Principle 11, Principles for Businesses, chapter 2, FSA Handbook). Disclosure to the FSA would therefore be an issue to consider where there is a question as to whether:

- the firm has conducted its business with integrity and in compliance with proper standards including the Conduct of Business Requirements set out in the FSA Handbook;
- the firm has conducted its affairs with the exercise of due skill, care and diligence;
- approved persons within the firm have acted with due skill, care and diligence in performing their 'controlled functions' or managing the business for which they are responsible;
- the firm has established and maintained adequate internal supervision and controls; and
- the firm has dealt with its customers appropriately.

Therefore, finding out that an employee has engaged in misconduct in some way in carrying out a controlled function is very likely to fall within one or more of the above categories and the firm may have a duty to disclose such matters to the FSA. It should be noted that a firm must notify the FSA if any of the matters set out in the Supervision Manual, chapter 15, part 3 arises. In particular, in relation to an individual employee's conduct, if a significant breach of a rule or Statement of Principle by an approved person has occurred (Supervision Manual 15.3.11), or if the employer becomes aware or suspects that an employee has committed fraud or is guilty of serious misconduct concerning his honesty or integrity which is connected with the firm's regulated activities (Supervision Manual 15.3.17), then the FSA must be notified if, in either case, the event is significant having regard to the size of any monetary loss, the risk of reputation to the firm or whether the incident reflects weaknesses in the firm's internal controls.

### **Suspension of employee(s)**

It is likely that, once potential misconduct in an individual's performance of a controlled function has been discovered, the firm will need to remove the employee from carrying out that controlled function – usually by suspending him or, in less serious cases, by

moving him into an unregulated job pending the completion of the investigation.

**Notification to FSA of ceasing to perform a controlled function**

If an employee ceases to perform a controlled function or functions, a notification has to be provided to the FSA on Form C. The form has to be submitted to the FSA no later than seven business days after an approved person has ceased to perform a controlled function. However, if the firm has reasonable grounds for believing that it will submit a qualified Form C, then it has an obligation to notify the FSA of that fact as soon as practicable, and ideally within one business day of becoming aware of the facts.

A Form C will be qualified if: (i) the firm submitting Form C reasonably believes that the information contained in it may affect the FSA's assessment of the approved person's fitness and propriety; (ii) the firm dismisses or suspends an approved person from its employment; or (iii) an approved person resigns while under investigation by the firm, the FSA or any other regulatory body.

The employer is obliged to make full disclosure of a suspected misconduct issue even where the employee has resigned before this has been investigated or fully investigated.

The employer has an obligation to behave in a demonstrably fair manner – this is extremely important both for the employment law claims that might be brought if it does not, but also because the FSA would wish to see the employer acting in a responsible manner when faced with misconduct that impacts upon the performance of controlled functions.

Normally, therefore, it will be appropriate to suspend the employee, but the employee handbook and contract should be checked to see what they say on the matter. Due consideration should also be given to whether the employee ought to be kept on the premises at work and put in an alternative role to maintain his co-operation and access to him during any investigation.

This investigation should be carried out entirely separately from the employment disciplinary process that will have to be followed in due course with the employee and that will be on open record. Often an attempt is made to use lawyers to claim privilege and specific advice should be taken regarding the nature and form of the investigation and any report to the FSA. However, it should be recognised that recent case law<sup>1</sup> has limited the ambit of legal privilege where

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<sup>1</sup> *Three Rivers DC v Bank of England* [2003] QB 1556; *Three Rivers DC v England* [2004] 2 WLR 1065; *United States of America v Philip Morris Inc* (2004) 148 S.J.L.B. 388

litigation is not contemplated and therefore notes of interviews (even if taken by lawyers) that simply record facts, rather than record the giving of legal advice, may in fact be disclosable. It may also be difficult to persuade a court that litigation is reasonably contemplated.

### **Whistleblowing**

It may be that the employer has found out about the problem because a whistleblower has reported the misconduct. This disclosure may have been made to HR, to a senior manager or to the compliance department. Alternatively, during an investigation into an employee's conduct, it is possible that an employee may seek to raise a complaint about or disclose some form of malpractice.

If the disclosure qualifies under the Public Interest Disclosure Act 1998 as a qualifying disclosure, then the employee who makes it will have protection from dismissal by reason of that qualifying disclosure and compensation for that dismissal will be unlimited.

A qualifying disclosure is the disclosure of information, which in the reasonable belief of the worker making the disclosure tends to show one or more of the following:

- a criminal offence may have been committed;
- a failure to carry out a legal obligation has occurred;
- a miscarriage of justice has occurred;
- the health and safety of an individual has been endangered;
- damage to the environment is suspected or has occurred; or
- disclosure of information showing the deliberate concealment of information regarding the above will also be a qualifying disclosure.

Any disclosure of any of the above must be made in good faith.

There are three levels of disclosure that are designed to encourage a worker to disclose:

- level 1 – internal (usually to the employer or employer's advisers);
- level 2 – prescribed body (usually to the regulator); and
- level 3 – to the police or media.

A level 1 disclosure will qualify if made in good faith with a reasonable belief that the malpractice or misconduct has occurred or will occur. If disclosing to the regulator at level 2, the employee must also reasonably believe that the allegations are substantially true. The FSA is a prescribed body for the purposes of level 2. To qualify as a

level 3 disclosure to a wider audience more stringent conditions apply.

The FSA issued guidance in May 2002 that actively encourages and requires authorised institutions to set up whistleblowing procedures. It has also promoted a hotline to the FSA for employees to use.

The FSA policy goes on to state that if the FSA should discover evidence that a firm has treated a whistleblower incorrectly then this is something that might call into question the firm's fitness and propriety, and therefore impact upon the firm's regulated status and the status of the approved person working for the firm who has been directly responsible for the treatment of the whistleblower.

So, if the employer has discovered the misconduct by reason of a qualifying disclosure then it must ensure that it deals with the whistleblower appropriately, ideally following any whistleblowing policy that sets up a procedure and mechanisms for the worker to make the disclosure and for the employer to investigate and respond to it. There should be absolute clarity of reporting lines to an independent person enshrined within that policy.

If that employee himself is part of an ongoing investigation then a separate investigation will have to be carried out into the whistleblowing allegation to ensure that this is dealt with appropriately before any disciplinary process can be commenced. An independent person should be appointed to deal with this aspect. Suspension of the individual is an option in the meantime if he himself is also suspected of misconduct in carrying out a regulatory function.

### **Employee monitoring**

At the start of the internal investigation it will be necessary to gather and review documents, computers and tapes.

Employee monitoring is covered by Part III of the DP Code issued in February 2004. The DP Code recognises that monitoring is important to allow employers to:

- monitor quality and quantity of work;
- carry out health and safety checks; and
- comply with regulatory obligations.

Any monitoring must be lawful and fair and the DP Code requires the employer to carry out an impact assessment before retrieving information.

In addition, employee monitoring is covered by:

- the Regulation of Investigatory Powers Act 2000 (RIPA), which prohibits interception of a communication without consent;
- the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, which contains practical exceptions to RIPA; and
- the Human Rights Act 1998, which gives individuals a right to respect for private life.

Essentially, if the employer weighs up the effect monitoring will have on the employee against the benefits that it will deliver to the employer, and the employer has a legitimate ground and conducts the monitoring in a proportionate manner, then the DP Code will not prohibit it.

In the process of retrieving the documents and/or tapes it will be important to check the employee monitoring policy in place at the firm to ensure that the employees were aware that they could be monitored.

#### **Disclosure to the FSA**

Under section 413 of FSMA the definition of ‘privilege’ covers communication between a professional legal adviser and his client and any items enclosed with or referred to in those communications, provided that they were created in connection with the giving of legal advice or in contemplation of the legal proceedings. It is not clear whether section 413 will be treated as being a codification of the common law or a separate regime. It would be prudent at present to assume that the limitations in relation to privilege being imposed by the courts under the common law may also apply in the context of section 413. Additionally, without prejudice communications are not, according to the legislation, ‘protected items’ and thus there is a risk that they may be disclosable to the FSA.

Documentation created during the investigation should be controlled to ensure that potentially privileged material does not find its way onto the HR file (and then is inadvertently disclosed by reason of a subject access request).

It will normally be necessary to delay dealing with the employment issues until the investigation has been completed and a report finalised for the FSA. The only step that will have been taken in respect of the employees concerned is that they will either have been suspended or moved to a non-regulated function while the investigation is carried out.

Subject access requests are a useful tool for a disgruntled employee and inadvertent filing or reference to individuals by name might

open up the employer to having to disclose more material than would otherwise have been necessary.

The labelling and filing of the report to the FSA will be important in protecting it from disclosure to any relevant employee under a subject access request under the DP Act. The report should not be included on the HR file and should ideally not be labelled with the individuals' names or filed by reference to their names.

## **Disciplinary process and terminations**

Following the conclusion of a regulatory investigation it is likely that the individuals concerned will need to be disciplined.

### **Disciplinary process**

The disciplining of an approved person will be similar to the process applied to any employee. However it will be essential for the employer to ensure that the disciplinary process is handled in a way that is consistent with any report that has been given to the FSA following an investigation. It should also ensure that any disciplinary steps are taken properly in accordance with the firm's obligations to the FSA. It is important to note that the FSA will be concerned, in assessing the firm's own conduct, to see what internal disciplinary process the firm has instigated against the individual employee(s) concerned.

Therefore, there should be real interaction between the compliance and HR departments in the drafting of the disciplinary documentation. The letter asking the employee to attend the interview should include a summary or 'charge sheet' of the allegations against him. These should obviously be prepared in a way consistent with any report to the FSA that has resulted from the investigation.

On termination of employment a Form C or D must be filled in. It may be that a provisional qualified Form C was supplied to the FSA when the employee was suspended. A completed Form C may be lodged on termination and should be consistent insofar as possible with that earlier document and with any report to the FSA.

### **Authorised firm's duties**

Senior management must be careful in the way that they delegate and manage risk to ensure that all matters relating to employees who are approved persons comply with the principle of openness to the FSA (ie Principle 11 of the Principles for Businesses). The firm should also make clear to its employees that it will be applying this principle and make clear the nature of its obligation to the FSA.

### **Settlement and without prejudice communications**

In any settlement discussions and without prejudice communications it should be remembered that without prejudice communications may not be privileged from disclosure to the FSA. In general, however, if the firm is acting responsibly in settling with the individual then the FSA is unlikely to be particularly concerned.

**Compromise agreements**

In agreeing compromise agreements for employees it will be important to limit the scope of any agreed references or announcements so that the requirements of the FSA's Supervision Manual are complied with.

## Subject access requests

A disgruntled employee has a powerful tool under the DP Act in that he may serve a subject access request on his employer.

An employee may request sight of and copies of personal data held by the employer at any time and before any legal proceedings have commenced. This request must be complied with within 40 days and the employee must pay a fee to the employer of £10.

The request will cover all personal data, whether electronic or manual, that is sortable by reference to the individual employee. This will include, of course, an employee's HR file, payroll records and emails extractable by reference to the employee's surname. As to what constitutes 'personal data', a more limited definition was set out in *Durant v Financial Services Authority*<sup>2</sup>. In brief, personal data will include biographical data where the data subject is the focus of the data such that it is information affecting a person's privacy whether in his/her personal or family life or business or professional capacity.

The request will not cover legally privileged material but will include any documentation created during the disciplinary process. It will not include a reference given by the employer to a prospective employer.

Ideally firms should have a policy on how to deal with subject access requests and the procedure to be adopted to ensure that if challenged they can show compliance with the DP Act 1998. Firms should overhaul their files generally in advance of any request and ensure that any privileged data is held separately. However, in each case it will be necessary to weigh up what material might be covered by the request and what documentation can be withheld under one of the exclusions provided for in the DP Act. The exclusions most commonly relied upon include the right to rely upon proportionality in responding and the obligation to protect third party confidentiality.

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<sup>2</sup> [2003] EWCA CIV 1746, Court of Appeal

## References

### Common law

There is no obligation at common law to provide a reference. However, employers must carefully consider the impact of a refusal to provide a reference – in practice, refusing to provide a reference can be very damaging. In most cases, we advise employers to provide some sort of reference, even if it is only factual.

However, under FSMA, if a client is asked for a reference for a former employee and is notified that the prospective employer wishes to appoint the individual as an approved person, the former employer must as soon as reasonably practicable provide all relevant information of which it is aware.

This obligation is set out in chapter 10 of the FSA's Supervision Manual (SUP), which deals with approved persons. SUP 10.13 deals with changes to an approved person's status and sets out the procedures to be followed when approved persons move within a firm, when they move between firms and when they cease to perform controlled functions.

SUP 10.13.12 provides that if firm A is considering appointing a person to perform a customer function, and asks firm B for a reference and indicates to B the purpose of the request, then B 'must as soon as reasonably practicable give A all relevant information of which it is aware'.

The House of Lords in *Spring v Guardian Assurance*<sup>3</sup> held that an employer owes a duty of care to an employee about whom he writes a reference to take reasonable care and skill in its preparation, and to provide a reference that is true, accurate and fair. The reference as a whole must not give a misleading impression. An employer will be liable to the employee in negligence if he fails to comply with this duty and the employee thereby suffers damage.

Under *Hedley Byrne v Heller*<sup>4</sup> principles, the employer also owes a duty of care to the recipient of a reference since it is reasonably foreseeable that the recipient will rely on its contents. If the recipient relies on a reference that is inaccurate because it was carelessly drawn up and thereby suffers loss, the referee may be liable to pay the recipient damages on account of his negligence.

In the case of *Cox v Sun Alliance*<sup>5</sup>, the Court of Appeal considered the requirements of accuracy and fairness for an employee who

<sup>3</sup> [1995] 2 AC 296

<sup>4</sup> [1964] AC 465

<sup>5</sup> [2001] IRLR 448

resigned while under investigation so that the investigation was never completed.

The Court of Appeal held that discharge of the duty of care to provide an accurate and fair reference will usually involve making reasonable inquiry into the factual basis of the statements in the reference, and confining unfavourable statements about the employee to those matters into which they had made reasonable investigation and had reasonable grounds for believing to be true.

The Court of Appeal held that although, to discharge the duty of care, an employer is not obliged to continue with an inquiry into an employee's conduct after the employee has resigned, if an investigation is discontinued, unfavourable comments should be confined to matters that were investigated.

The key points to draw from *Cox v Sun Alliance* are that in preparing a reference, the employer must have a genuine belief that the information provided is true, it must have reasonable grounds for that belief, and it must have carried out a reasonable investigation. A reference will be negligent if it alludes to an employee's misconduct in circumstances where the employer has not carried out an investigation, and does not have reasonable grounds for believing in his misconduct.

### **Supervision manual**

The duty under FSMA is to provide all relevant information as soon as reasonably practicable.

Under SUP 10.13.12, in considering what is relevant for these purposes a former employer must have regard to:

- any outstanding liabilities from commission payments;
- any relevant outstanding or upheld complaints;
- section 5 of Form A in SUP 10 Annex 4D; and
- FIT 2.

Having regard to section 5 of Form A means that in preparing a reference, the referee must consider the 26 issues raised in section 5 of Form A that go to fitness and propriety. This means that a simple 'name' reference can no longer be given when a request under SUP 10.13 is received and the drafting of any reference must be carefully considered.

All references should be marked Private and Confidential. References given by one employer to a prospective employer may not be made the grounds for a libel action by the employee, even if the information proves to be inaccurate, provided that the employer

believes the information to be correct and gives it without malice. This is because the employer (or ex-employer) and the prospective employer have a common interest in the statement made about the employee, and that statement is protected by qualified privilege<sup>6</sup>.

The defence of qualified privilege may be lost if the statement is not merely passed between people having a mutuality of interest in the subject matter but falls into the hands of a third person. Thus to reduce the possibility of a libel action, all references should be carefully marked Private and Confidential.

In an effort to exclude liability for negligent misstatement, employers regularly insert disclaimers in references purporting to exclude liability for any loss or damage resulting from reliance on the reference. Under the Unfair Contract Terms Act 1977 such a disclaimer will only be effective in so far as it 'satisfies the requirement of reasonableness' (s2(2)).

If the reference purports to give facts that are ordinarily within the knowledge of an employer, it is unlikely that liability can be excluded for negligent misstatement of those facts. However, if the reference contains an opinion as to the employee's suitability for a certain post that he has not filled in the past, it may be reasonable to insert a disclaimer regarding the statement of opinion. Best practice would be to ensure that statements of opinion are never included in a reference.

Where a reference is provided under FSMA, the traditional disclaimer is unlikely to be effective regarding those parts of the reference governed by the FSA Handbook. Nonetheless, it is probably worth including a disclaimer because it may be of effect in relation to those parts of the reference that are not governed by the FSA Handbook.

References provided under SUP 10.13 cannot be obtained from the referee by serving a subject access request under the DP Act since confidential references are exempt from disclosure under schedule 7 of the DP Act. However, the employee may obtain a copy by serving a subject access request on the prospective employer.

#### **Avoiding problems regarding references**

- Construe the regulatory obligation strictly;
- ensure the reference is consistent with any report to the FSA;
- remember that the reference must be provided as soon as reasonably practicable;

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<sup>6</sup> *Hodgson v Scarlett* (1818) 1 B & Ald 239; *Sutherland v British Telecommunications plc*, 1989 S.L.T. 531

- and must include all relevant information as set out in SUP 10.13.12;
- the reference must be prepared with due care and skill;
- the overall impression must be accurate (based on documented fact) and fair;
- confine unfavourable statements to information that the employer:
  - genuinely believes to be true;
  - has reasonable grounds for believing to be true; and
  - was the subject of a reasonable investigation;
- mark the reference Private and Confidential;
- if an investigation was not concluded, say so; and
- if allegations have never been put to the employee, this should be made clear in the reference<sup>7</sup>.

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<sup>7</sup> *TSB Bank plc v Harris* [2000] IRLR 157

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<p>BARCELONA Mestre Nicolau 19 08021 Barcelona T + 34 93 363 7400 F + 34 93 419 7799</p>	<p>DÜSSELDORF Freiligrathstraße 1 40479 Düsseldorf T + 49 211 49 79 0 F + 49 211 49 79 10 3</p>	<p>MADRID Fortuny 6 28010 Madrid T + 34 91 319 1024 F + 34 91 308 4636</p>	<p>SINGAPORE Freshfields Drew &amp; Napier 20 Raffles Place #18-00 Ocean Towers Singapore 048620 T + 65 6535 6211 F + 65 6533 5007/8007/9007</p>
<p>BEIJING 3705 China World Tower Two 1 Jianguomenwai Avenue Beijing 100004 T + 8610 6505 3448 F + 8610 6505 7783</p>	<p>Mailing address: Postfach 10 17 43 40008 Düsseldorf</p>	<p>MILAN Via dei Giardini 7 20121 Milan T + 39 02 625 301 F + 39 02 625 30800</p>	<p>TOKYO Freshfields Law Office Freshfields Foreign Law Office Ark Mori Building 18th floor 1-12-32 Akasaka Minato-ku Tokyo 107-6018 T + 81 3 3584 8500 F + 81 3 3584 8501</p>
<p>BERLIN Potsdamer Platz 1 10785 Berlin T + 49 30 20 28 36 F + 49 30 20 28 37 66</p>	<p>FRANKFURT AM MAIN Taunusanlage 11 60329 Frankfurt am Main T + 49 69 27 30 80 F + 49 69 23 26 64</p>	<p>MOSCOW Kadashevskaya nab 14/2 119017 Moscow T + 7 501 (or +7 095) 785 3000 F + 7 501 (or +7 095) 785 3001</p>	
<p>BRATISLAVA Laurinská 12 81101 Bratislava T + 421 2 5413 1121 F + 421 2 5413 1123</p>	<p>HAMBURG Alsterarkaden 27 20354 Hamburg T + 49 40 36 90 60 F + 49 40 36 90 61 55</p>	<p>MUNICH Prannerstraße 10 80333 Munich T + 49 89 20 70 20 F + 49 89 20 70 21 00</p>	<p>VIENNA Seilergasse 16 1010 Vienna T + 43 1 515 15 0 F + 43 1 512 63 94</p>
<p>BRUSSELS Bastion Tower Place du Champ de Mars/Marsveldplein 5 1050 Brussels T + 32 2 504 7000 F + 32 2 504 7200</p>	<p>Mailing address: Postfach 30 52 70 20316 Hamburg</p>	<p>NEW YORK Freshfields Bruckhaus Deringer LLP 520 Madison Avenue 34th floor New York, NY 10022 T + 1 212 277 4000 F + 1 212 277 4001</p>	<p>WASHINGTON Freshfields Bruckhaus Deringer LLP 701 Pennsylvania Avenue, NW Suite 600 Washington, DC 20004-2692 T + 1 202 777 4500 F + 1 202 777 4555</p>
	<p>HANOI #05-01 International Centre 17 Ngo Quyen Street Hanoi T + 84 4 8247 422 F + 84 4 8268 300</p>	<p>PARIS 2/4 rue Paul Cézanne 75375 Paris Cedex 08 T + 33 1 44 56 44 56 F + 33 1 44 56 44 00</p>	<p>8842</p>
	<p>HO CHI MINH CITY #1108 Saigon Tower 29 Le Duan Boulevard District 1 Ho Chi Minh City T + 84 8 8226 680 F + 84 8 8226 690</p>		

