

Singapore's Proposal to Mandate Reference Checks and Misconduct Reporting

The Monetary Authority of Singapore (**MAS**) has issued a Consultation Paper on Proposals to Mandate Reference Checks. All financial institutions and entities regulated by the MAS are proposed to be required to carry out reference checks and to keep conduct records on the majority of their employees. If the proposed regime is implemented without change, it will mean that Singapore's reference checks regime will be substantially aligned with that which is currently in place in the UK as well as that which is being implemented in Hong Kong. The consultation paper was issued on 14 May 2021 and closes on 25 June 2021.

We have summarised some of the key features of the proposals below, and identified some of the practical challenges that FIs/regulated entities might face in the implementation of the proposed regime. In addition, we also take a look at the misconduct reporting requirements as finalised by the MAS. These were set out in its response to industry feedback to the 2018 Consultation Paper on Revisions to Misconduct Reporting Requirements and Proposals to Mandate Reference Checks. This response was also issued on 14 May 2021.

The Reference Checks Consultation proposes that:

- All financial institutions (**FIs**) and entities regulated by the MAS be required to carry out reference checks. Accordingly, this will include banks, merchant banks, persons regulated under the Payment Services Act and many others.
- Employees for whom FIs and regulated entities will need to carry out reference checks are proposed to include senior managers (the list of persons is substantially the same as that for the MAS's senior manager accountability regime) and persons involved in certain specified key functions.
- FIs and regulated entities will need to maintain conduct records over all employees of the FI/regulated entity except for those in ancillary functions (e.g. clerical personnel, drivers).
- The requirements for reference checks proposed earlier in the MAS Consultation Paper on Revisions to Misconduct Reporting Requirements and Proposals to Mandate Reference Checks on 6 July 2018 (**Misconduct and References Consultation**) will apply to all FIs and regulated entities.

We have summarised some of the key features of the proposals below, and identified some of the practical challenges that FIs/regulated entities might face in the implementation of the proposed regime.

Two proposed groups of employees for reference checks

MAS has proposed two possible groups of employees in key functions for whom reference checks would be required. The first proposed group is all persons involved in the following:

- risk-taking functions
- risk management and control functions
- performing critical system administration
- authorising or approving payments (excluding small payments)

The second proposed group will encompass the above but will exclude the following:

- individuals responsible for taking actions that result in an FI/regulated entity undertaking operational risk, technology risk, legal risk, regulatory risk or reputational risk in the course of the FI's business (e.g. Human Resource staff, Loan Administration staff and staff in Finance who are performing tax and financial reporting)
- individuals who are responsible for auditing compliance with policies and procedures introduced pursuant to the relevant legal and regulatory requirements in the jurisdictions that it conducts business in (e.g. staff in the internal audit function)

Proposed requirements for reference checks

As noted above, the MAS has proposed that the requirements for reference checks be the same for all FIs and regulated entities. The proposed requirements (set out in the Misconduct and References Consultation and as modified following feedback from the industry) are as follows:

- All FIs/regulated entities must share information on employees in response to reference check requests.
- To standardise practices, certain information for reference checks will be mandated.
- The mandated information must be provided within 21 calendar days of the receipt of the request.
- The lookback period will be a minimum of five years.

The following additional points in the MAS's response to feedback on the Misconduct and References Consultation are noteworthy:

- Among the information mandated is a requirement to disclose investigations. The MAS has clarified that there is no need to disclose investigations that concluded in favour of the employee. However, FIs must provide information on past investigations where they have reasonable grounds to believe that there was wrongdoing committed by the representative.
- Where prospective employees have requested that their job search be confidential, FIs and regulated entities may make the reference check only after the individual's appointment has ceased with his current employer. However, prospective employers are expected to take appropriate action (including, if justified, to withdraw the offer or to inform the individual that the offer condition has not been satisfied, as the case may be) if there are adverse responses on the individual in the reference check.
- In instances where the recruiting FI is unable to obtain a reference from the individual's current/past employers within the prescribed timeline or if the reference obtained is incomplete, the FI is still required to make an assessment of the individual's fitness and propriety based on other available information and due diligence conducted. Nonetheless, should the individual's employers provide a reference subsequently, the FI is required to factor in the new information received in its assessment on whether the representative remains fit and proper. The FI should take appropriate action (including, if justified, to terminate the appointment) thereafter, if the FI has reasonable grounds to believe that the representative is not fit and proper to conduct regulated activities.

Areas of practical concern raised

Our experience with the implementation of a comprehensive system of reference checks indicates some areas of perennial concern:

- The issue of ongoing investigations and whether these must be disclosed. The MAS has usefully clarified here that information need not be provided if it will tip off the former employee. However, if the employee is already part of the investigation process or midway through a disciplinary process, the extent of information to be provided pursuant to a request will be a thorny question, in particular as the MAS has specifically stated that it will not be providing any immunity from liability arising from responses to reference checks. One route might be to include basics of the investigation and its status, following which the recruiting FI may pick up the conversation with the employee.
- The mandated list of information to be provided in response to a reference check includes "compliance records relating to the individual's fitness and propriety". On its face, this appears to be a more objective standard than the request for information as to "incidents related to honesty, integrity or matters of similar nature" or information as to whether the referee is "aware of any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper" (as required in the Hong Kong Monetary Authority's MRC Information Template). Much will depend on the extent and breadth of information that the MAS may require to be kept for conduct records and more clarity from the MAS on the extent of records to be kept will therefore be useful.

- A related issue that has arisen in the UK is the extent to which private conduct may be said to impinge on whether an individual may be said to be fit and proper. The Financial Conduct Authority has made clear that non-financial misconduct is misconduct. In its view, behaviour such as sexual misconduct, sexual harassment, other forms of harassment, discrimination and bullying have a significant impact on aspects of firms' cultures, such as the extent to which their employees are able to perform their roles in accordance with regulatory requirements and feel able to 'speak up'. In Singapore, the list of mandated information requires the referee to provide information on "compliance records relating to the individual's fitness and propriety, including but not limited to records concerning investigations, breaches of legal or regulatory requirements administered by the MAS, disciplinary actions and misconduct reports". Although the list of enumerated compliance records is specified to be non-exhaustive, the common factor in each of the enumerated items is that they relate specifically to financial misconduct. This may therefore be an indication that the MAS is less concerned with, say, discrimination and bullying and more concerned with misconduct directly related to financial transactions and financial advice.
- Firms in the UK are required to carry out an annual certification exercise as to the fitness and propriety of in-scope employees. This has in practice turned out to be a significant operational undertaking. While such a certification exercise is not proposed to be required in Singapore, the question arises as to the required scope of employee conduct records to be kept. This is an issue which will require further clarity from the MAS.

Timing/Next steps for implementation of reference checks

The Reference Checks Consultation closes on 25 June 2021. The MAS has also proposed a transitional period of six months from the date the finalised notice is published. In view of this, actual implementation will likely not take effect until the second half of 2022 at the earliest. Notwithstanding this timeline, FIs and regulated entities with a presence in the UK and Hong Kong would be advised to start familiarising themselves with the processes and systems used by their offices in these jurisdictions in anticipation of the possible need to duplicate those processes and systems in their Singapore offices.

Misconduct reporting requirements

In addition to the Reference Checks Consultation, the MAS also issued its response to the Misconduct and References Consultation issued in 2018.

The requirements for reporting misconduct to the MAS remains confined to representatives of holders of capital market services licences, licensed financial advisers, registered insurance brokers and persons exempted from licensing requirements to carry out these activities.

The key finalised requirements for misconduct reporting are as follows:

- In addition to the persons listed above, Registered Fund Management Companies will be required to report misconduct of representatives that falls within the list of reportable misconduct as set out below.
- The MAS will no longer require FIs to submit an annual nil declaration when no misconduct is reportable in the calendar year.
- The FI must lodge a misconduct report with the MAS within 21 calendar days of when the FI has reasonable grounds to believe that a misconduct has been committed. If there is a significant development after this initial lodgement, the FI must update the MAS within 21 calendar days of the significant development.
- The FI must provide a copy of the misconduct and update report lodged with the MAS to the representative within 21 days of the date of lodgement.
- The representative must provide a copy of the misconduct and update report (if any) provided to them to their current or recruiting FIs.

The list of reportable misconduct has been finalised as follows:

- Acts involving inappropriate advice or recommendation, misrepresentation, gross negligence, or inadequate disclosure of information which have a material adverse impact on the interests of the client or impinges on the fitness and propriety of the representative
- Acts involving inappropriate advice or recommendation, misrepresentation, gross negligence, or inadequate disclosure of information which have a material adverse impact on the interests of the client or impinges on the fitness and propriety of the broking staff
- Acts involving fraud, dishonesty, illegal monetary gains, or other offences of a similar nature (e.g. cheating, forgery, misappropriation of monies, criminal breach of trust, bribery, money laundering or tax evasion)
- Acts relating to market conduct provisions under Part XII of the SFA (e.g. insider trading or other prohibited conduct as set out in Part XII of the SFA, such as securities market manipulation and financial benchmarks manipulation)
- Acts involving failure to exercise due care and diligence, misrepresentation, or inadequate disclosure of information

The following additional points on misconduct reporting (in the MAS response to feedback) are noteworthy:

- The MAS will specify in the revised Misconduct Notices that FIs are required to report a representative's misconduct when there are reasonable grounds to believe that misconduct has been committed. In other words, the MAS expects FIs to have established, with reasonable certainty, that the representative has committed the misconduct before reporting the misconduct to MAS. This could take place in the course of investigations or at the conclusion of the investigation of the case, depending on the facts and circumstances surrounding the case in question.
- FIs will not be required to notify representatives when they are under investigation.
- FIs should ensure that the misconduct report does not contain any confidential client information. In addition, details of the investigation should be set out in a separate investigation report submitted to the MAS, and need not be provided to the representative concerned.
- FIs are to update the MAS after they are aware of the outcome of police investigations. This will be circumscribed to cases that are reported to the police by the FIs. Given the nature of police investigations, FIs will not be expected to actively seek updates on the progress or outcome of the investigations.

Timing/Next steps for implementation of the revised misconduct reporting requirements

While the MAS has not indicated when it will implement the revised misconduct reporting requirements, it seems likely that it will roll this out in conjunction with the requirement for expanded reference checks. If so, holders of capital market services licences, licensed financial advisers, registered insurance brokers, persons exempted from licensing requirements to carry out these activities, and registered fund management companies should be reviewing their internal processes for capturing and reporting misconduct with a view to implementing changes in time for the second half of 2022.

Contacts

Australia



Jason Denisenko
Partner – Sydney (CO)
Tel +612 9373 7809
jason.denisenko@allenoverly.com

Hong Kong



Charlotte Robins
Partner – Hong Kong (ICM)
Tel +852 2974 6986
charlotte.robins@allenoverly.com



Matt Bower
Partner – Hong Kong (LT)
Tel +852 2974 7131
matt.bower@allenoverly.com

Singapore



Shuhui Kwok
Partner – Singapore (CO)
Tel +65 6671 6065
Shuhui.Kwok@AllenOverly.com



Wee Teck Lim
Senior Professional Support
Lawyer – Singapore (ET)
Tel +65 6671 6142
weeteck.lim@allenoverly.com