

Chapter 22

Regulatory references

22.5 Giving references: additional rules and guidance for all firms

Verification

22.5.1 **R** This chapter does not require a *firm* to disclose information that has not been properly verified.

22.5.2 **G**

- (1) For example, this chapter does not necessarily require a *firm* to include in a reference the fact that an *ex-employee* left while disciplinary proceedings were pending or had started. Including such information is likely to imply that there is cause for concern about the *ex-employee* but the *firm* may not have established that the *ex-employee* was actually responsible for misconduct.
- (2) However, a *firm* may include such information in a reference if it wishes to (see **SYSC 22.3.5G**).

Accuracy

22.5.3 **G** A *firm* should, when giving a reference under this chapter, provide as complete a picture of an *employee's* conduct record as possible to new *employers*.

Fairness

22.5.4 **G**

- (1) A *firm* supplying a reference in accordance with this chapter owes a duty under the general law to its former *employee* and the recipient *firm* to exercise due skill and care in the preparation of the reference.
- (2) The *firm* may give frank and honest views, but only after taking reasonable care both as to factual content, and as to the opinions expressed.
- (3) References should be true, accurate, fair and based on documented fact.

22.5.5 **G**

- (1) An example of the general duty described in **SYSC 22.5.4G** is that fairness will normally require a *firm* to have given an *employee* an opportunity to comment on information in a reference. The *firm* might do this through, for example, disciplinary proceedings.

- (2) Paragraph (1) does not mean that the *firm* should provide an opportunity to comment on the reference itself, as opposed to the allegations on which it is based.
- (3) A *firm* may have given the *employee* an opportunity to comment on allegations that are later included in a reference even though, at the time that the *firm* is giving that opportunity, no reference is being contemplated. That may mean that the *firm* gives the *employee* their opportunity to comment on the allegations some time before the reference is prepared.
- (4) Paragraph (1) does not mean that a *firm* will be unable to include an allegation in a reference if it has offered the *employee* an opportunity to comment on the allegation but the *employee* has unreasonably refused to do so.
- (5) Where a *firm* should have given an *employee* an opportunity to comment on an allegation if the allegation is to be included in a reference, this chapter requires the *firm* to give the *employee* that opportunity rather than merely to leave the allegation out of the reference.
- (6) Paragraph (5) may mean that where the *firm* has not given its *employee* an opportunity to comment on a matter at the time it first arose, it will have to give the *employee* the opportunity around the time that the *firm* is preparing the reference.
- (7) The obligation to give an *employee* an opportunity to comment does not mean that there is a wider duty to investigate whether there are facts that show that there has been a conduct breach (see ■ SYSC 22.5.18G).
- (8) This chapter does not require the *employee's* views to be included in the reference. Instead the *firm* should take those views into account so far as appropriate when deciding whether something should be disclosed and how the disclosure is drafted.

Outsourcing

22.5.6 G The requirements in this chapter for a *firm* (B) to give a *firm* (A) a reference also apply where A has outsourced the collection of that information to another (unregulated) third party, where B has been made aware that the unregulated third party is acting on behalf of A.

Circumstances in which the ex-employee left

22.5.7 G The obligation to give a reference for an *employee* or *ex-employee* applies however the *employment* ended or is going to end. For example, it applies whether it ended through resignation, redundancy, dismissal or fixed term work, a secondment or temporary work coming to an end.

Missing or incomplete information

22.5.8 G (1) If a *firm's* records do not cover the maximum periods contemplated by ■ SYSC 22.2.2R or ■ SYSC 22 Annex 1R (Template for regulatory

references given by SMCR firms and disclosure requirements), the *firm* should note that in the reference.

- (2) A *firm* should not include a warning of the type described in (1) as a matter of routine. It should only be included if there is a genuine need to include it.

All relevant information: Calculation of six year period for disclosure

22.5.9

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- (1) In general there is a six year limit on what should be disclosed under ■ SYSC 22.2.2R(1) to (3).
- (2) Where the matter to be disclosed consists of a single course of conduct (such as market manipulation) the six year period does not begin until that course of conduct has come to an end. This means that individual events that occurred more than six years ago may still be within the six year limit.
- (3) This *guidance* is also relevant to the six year time limits for updating references in ■ SYSC 22.2.6R.

All relevant information: Removal of six year period

22.5.10

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- (1) ■ SYSC 22.2.2R(1) to (3) normally has a six year time limit. ■ SYSC 22.2.2R(3)(c) removes that time limit for serious matters. This paragraph (■ SYSC 22.5.10G) and ■ SYSC 22.5.11G have *guidance* about this. This *guidance* is also relevant to the time limits for updating references in ■ SYSC 22.2.6R.
- (2) The removal of the time limit does not mean that the time that has elapsed since the matter occurred is irrelevant. The length of time that has elapsed is relevant to deciding whether the matter is serious. In general, the longer ago the matter occurred, the less likely it is still to be serious for these purposes.
- (3) In determining whether something is serious for these purposes, the key question is how important the information still is for the requesting *firm's* assessment of the *employee's* fitness for the function that they are going to perform.
- (4) In considering what is relevant, a *firm* should, in particular, have regard to ■ SYSC 22.5.4G (Fairness).
- (5) The table in ■ SYSC 22.5.11G provides *guidance* on some of the factors which a *firm* should take into account when determining whether a matter is serious.
- (6) The *guidance* in this paragraph and in the table in ■ SYSC 22.5.11G is only designed for the purposes of this chapter. It does not, for example, apply for the purposes of ■ SUP 15 (Notifications to the FCA), DEPP or EG.

22.5.11

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Table: Examples of factors to take into account when deciding whether old misconduct is sufficiently serious to disclose

Factors to take into account	Comments
<p>(A) Whether P has committed a serious breach of individual conduct requirements.</p>	<p>Individual conduct requirements has the same meaning as in Part Two of SYSC 22 Annex 1R (Template for regulatory references given by SMCR firms and disclosure requirements).</p> <p>Factors to take into account in deciding whether the breach is serious include the following.</p> <p>(1) The extent to which the conduct was deliberate or reckless.</p> <p>(2)The extent to which the conduct was dishonest.</p> <p>(3)Whether the breaches are frequent or whether they have continued over a long period of time. The fact that breaches were frequent or repeated may increase the likelihood that they should be disclosed since the breaches may show a pattern of non-compliance.</p> <p>(4)The extent of loss, or risk of loss, caused to existing, past or potential investors, depositors, policyholders or other counterparties or customers.</p> <p>(5)The reasons for the breach. For example, where the breach was caused by lack of experience which has been remedied by training or further experience, it is less likely that the breach will still be relevant.</p>
<p>(B) Whether the conduct caused B to breach requirements of the <i>regulatory system</i> or P was concerned in a contravention of such a requirement by B and, in each case, whether P’s conduct was itself serious.</p>	<p>(1) The factors in (A) are relevant to whether P’s conduct was serious.</p> <p>(2)The seriousness of the breach by B is relevant. The factors in (A) are also relevant to this.</p> <p>(3)A breach by B of certain requirements is always likely to be serious under (2). Breach of the <i>threshold conditions</i> is an example. However that does not mean that P’s involvement will automatically be serious.</p>
<p>(C) Whether P’s conduct involved dishonesty (whether or not also involving a criminal act).</p>	<p>Dishonesty is an important factor but it is not automatically decisive in every case. For instance, a small one-off case of dishonesty many years ago may not be sufficiently serious to require disclosure.</p>
<p>(D) Whether the conduct would have resulted in B’s dismissing P, had P still been working for B, based on B’s disciplinary policies and the requirements of the law about unfair dismissal.</p>	
<p>(E) Whether the conduct was such</p>	

Factors to take into account	Comments
<p>that, if B was considering P for a role today and became aware of the historical conduct, B would not employ P today notwithstanding the time that has passed.</p> <p>Note 1: P refers to the <i>employee</i> about whom the reference is being written.</p> <p>Note 2: B refers to the <i>firm</i> giving the reference.</p>	
<p>22.5.12 G</p> <p>(1) [deleted] [<i>Editor's note:</i> The text of this provision has been moved to ■ SYSC 22.8.10G(2)]</p> <p>(2) [deleted] [<i>Editor's note:</i> The text of this provision has been moved to ■ SYSC 22.8.10G(1)]</p>	
<p>Agreements not to disclose information</p>	
<p>22.5.13 R</p>	<p>A <i>firm</i> must not enter into any arrangements or agreements with any <i>person</i> that limit its ability to disclose information under this chapter.</p>
<p>22.5.14 G</p> <p>■ SYSC 22.5.13R covers all types of agreements and arrangements. For example:</p> <p>(1) it is not limited to an agreement or arrangement entered into when the <i>employee</i> leaves;</p> <p>(2) it applies however the <i>employment</i> ends (see ■ SYSC 22.5.7G); and</p> <p>(3) it covers a "COT 3" Agreement settled by the Advisory, Conciliation and Arbitration Service (ACAS).</p>	
<p>22.5.15 G</p>	<p>A <i>firm</i> should not give any undertakings to suppress or omit relevant information in order to secure a negotiated release.</p>
<p>22.5.16 G</p>	<p>The obligation to supply information to another <i>firm</i> under this chapter will apply notwithstanding any agreement prohibited by ■ SYSC 22.5.13R.</p>
<p>Time in which to respond to reference requests</p>	
<p>22.5.17 G</p>	<p>The <i>FCA</i> expects that normally a <i>firm</i> should issue a reference under this chapter within six weeks of being asked to.</p>
<p>Duty to investigate allegations</p>	
<p>22.5.18 G</p> <p>(1) A <i>firm</i> should, wherever feasible, conclude investigative procedures before the <i>employee</i> departs.</p> <p>(2) However, this chapter does not create a duty to investigate alleged misconduct by an <i>employee</i> or former <i>employee</i>.</p>	

- (3) There are several reasons why a *firm* may find it appropriate to investigate potential misconduct by an *employee* or former *employee*, including:
 - (a) assessing the actual and potential damage resulting from misconduct;
 - (b) identifying other individuals potentially culpable or accountable for the breach;
 - (c) satisfying itself that the *SMF manager* responsible for the areas where the misconduct occurred took reasonable steps to prevent or stop it; and
 - (d) (where the *employee* has *remuneration* susceptible to malus or clawback) enabling it to consider whether any adjustments are justified.

Criminal record checks

22.5.19

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A *firm* giving a reference need not include information from a criminal records check it has carried out under Part V of the Police Act 1997 (Certificates of Criminal Records, &). The recruiting *firm* should carry out a criminal records check itself if necessary. The main *FCA Handbook* requirements on a recruiting *firm* to carry out a criminal records check are:

- (1) ■ SUP 10C.10.16R a *firm* should carry out such a check when appointing an *SMF manager*; and
- (2) ■ SYSC 23.4 (Criminal record checks for certain directors).