

RESPONSE TO CONSULTATION PAPER

Consultation topic:	Public Consultation on Proposals to Mandate Reference Checks
Name of Entity¹: ¹ if responding in a personal capacity	Asia Securities Industry & Financial Markets Association (ASIFMA)
Name of Individual/Contact person	Patrick Pang
Contact No:	+852 2531 6520
Contact email:	ppang@asifma.org
Confidentiality	
Do you wish to keep your identity and submission confidential:	No <i>(Please indicate any parts of your submission you would like to be kept confidential, or if you would like your identity to be kept confidential. Your contact information will not be published.)</i>

General comments:

The Asia Securities Industry & Financial Markets Association¹ (**ASIFMA**) and its members would like to thank the Monetary Authority of Singapore (**MAS**) for inviting interested parties to submit their views and comments on the Consultation Paper (P006-2021) on Public Consultation on Proposals to Mandate Reference Checks issued by MAS on 14 May 2021 (**Consultation Paper**). In this regard, we have collated feedback from ASIFMA members on the proposals in the Consultation Paper and hereby respond on their behalf to the questions posed by MAS in the Consultation Paper.

By way of general comments, we are generally supportive of most of the proposals in the Consultation Paper. However, we have identified certain operational challenges and practical difficulties that financial institutions (**FIs**) will likely face in implementing the proposals in their currently proposed form and areas where FIs would benefit from further clarification – these are referred to in our response below.

Stronger protection for FIs

We respectfully seek MAS' implementation of a framework that protects FIs from any liability for the sharing of adverse information in respect of an employee, so long as the adverse information shared is not grossly inaccurate and has been prepared/submitted based on adequate internal controls and processes. In this regard, we respectfully seek protection from MAS for an employer who withdraws an offer based on an adverse reference; and protection to the FI that provided the reference. Should MAS not be minded to provide such protection, we urge MAS to consider setting a cap on the amount of any potential liability.

FIs should not be required to opine definitively on whether there has been a breach of a regulatory obligation or an offence committed by an employee, unless such a determination has been made by either a regulator or a court of law respectively. Accordingly, the mandatory information to be provided by an FI in response to a reference check request should not include such information unless such a determination has been made.

¹ ASIFMA is an independent, regional trade association with over 145 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, professional service firms, law firms and market infrastructure service providers. It harnesses the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. It drives consensus, advocates solutions and effects change around key issues through the collective strength and clarity of one industry voice. ASIFMA is the Asia member of the Global Financial Markets Alliance (GFMA).

Non-disclosure by representative or employee

We seek MAS' response as to whether MAS intends to impose any penalty on an employee that does not disclose to its prospective principal company that it is aware of a misconduct report having been filed with MAS by his/her former employer.

Intra-group transfer

We seek MAS' clarification as to whether the prescribed reference check would be required in the scenario where an employee is transferred from another intra-group entity, or whether FIs can retain the flexibility of conducting their due diligence checks based on internal human resource policies.

We would also be grateful if MAS could clarify to what extent it envisages that obtained reference-check information may be shared with other entities within the FI's group (eg affiliates) and used in relation to matters such as an affiliate's decision as to whether to hire a particular employee.

Industry-wide utility

While we appreciate and understand MAS' view that industry stakeholders would be best placed to create market-driven solutions that would serve their needs in conducting reference checks, we do foresee that it would be difficult to implement an industry-wide utility to allow recruiting FIs to access misconduct reports filed with MAS or other relevant information in relation to employees given data privacy concerns and restrictions. Keeping such information up to date on a central utility would also be a burdensome task for the industry.

ABS requirements

We seek clarification as to how the reference check proposal will interact with existing Association Bank of Singapore (**ABS**) requirements on references for regulated individuals and dealers and whether these ABS requirements would be superseded when the reference check proposals come into effect.

FI that fails to exist

We would be grateful for guidance as to what a prospective employer's obligation is where dealing with a reference providing FI which has ceased to exist.

Legal consequences

We seek clarification as to the legal and/or regulatory consequences for a prospective employer which chooses to hire an individual despite having being told about misconduct

in their previous employment history. In particular, we would appreciate guidance from MAS as to whether FIs should have regard to the following in making a hiring decision in relation to an employee who has engaged in past misconduct:

- (a) how recent the misconduct in question was; and
- (b) the factors set out in the MAS Fit and Proper Guidelines in relation to whether an employee remains fit and proper, including in relation to prospective employees licensed by other regulators or who are not regulated.

Question 1. MAS seeks comments on the proposed scope of FIs to be subject to the reference checks requirements.

We agree with the proposed scope of FIs to be subject to the reference checks requirements.

Question 2. MAS seeks comments on the (i) scope of employees for which FIs are required to perform reference checks, and respond to requests for reference checks, in particular: (a) Whether the scope of employees should be aligned to Option 1 in paragraph 4.3 or Option 2 in paragraph 4.4. Specifically, the functions that should be scoped out under Option 2, and justifications for doing so

Scope of employees

We submit that the scope of employees should be aligned to Option 2 in paragraph 4.4. of the Consultation Paper, subject to the modifications proposed below:

- (a) only functions under Option 2 that can directly cause material financial risks to FIs or customers should be included;
- (b) only persons under Option 2 with sufficient seniority should be in scope, i.e. persons identified as "senior managers" for the purposes of MAS' Guidelines on Individual Accountability and Conduct (**IAC Guidelines**) other than persons who are employed by a non-MAS regulated overseas affiliate/branch of the FI who have been identified as a "senior manager" of a the MAS-regulated FI for the purposes of the IAC Guidelines, as it will be challenging for the MAS-regulated FI to impose the necessary record keeping requirements etc on the non-MAS regulated overseas affiliate/branch; and
- (c) if MAS is not minded to limit the scope to senior managers per our submission above, Option 2 should exclude secretaries/administrative support staff, and other staff performing support functions which are of an administrative nature, e.g. staff who are involved in public relations work or the design and implementation of marketing campaigns (or similar) as such staff would usually work with external

advertising agencies on the marketing campaigns and undertake a nature of work that is very similar to external advertising/PR agencies.

Alternatively, we respectfully submit that MAS consider limiting the scope of employees to MAS-regulated employees instead.

We seek clarification on the following without prejudice to our submissions above:

- (a) **application to staff not employed by the MAS-regulated FI but performing functions for/on behalf of the MAS-regulated FI:** for example, where staff in risk management/control functions provide services to one or more MAS-regulated FIs in the corporate group and are employed by a non-MAS regulated affiliate. We would be grateful to clarify whether these persons are in scope. In any event, we submit that outsourced service providers (including group entities) should not be in scope as the individual is not employed by/does not hold a permanent position with the FI and instead is the outsourced service provider's employee;
- (b) **application to staff outside of Singapore** (should MAS seek to apply the requirements to employees of non-MAS regulated affiliates per the above point): we submit that the scope should be limited to only those persons employed by Singapore FIs. We also submit that inter-company transfers should be excluded from the scope as this would be extra-territorial; and
- (c) **definition of "ancillary service personnel":** whether "clerical personnel" would include personal assistants/ secretaries, receptionists, office administrators/ managers (i.e. in charge of office logistics) etc.

Question 2(i)b. MAS seeks comments on: Suggestions on other possible approaches with respect to the scope of employees that MAS should consider when finalising the proposal.

In addition, we submit that the scope of employees covered should be such that:

- (a) the reference checks are required only for permanent staff and contractors with contract period > 6 months; and
- (b) not applicable to outsourced service providers' employees, including those who are based onsite.

Question Q2(ii). MAS seeks comments on the appropriate definition or threshold on what constitutes a small payment under paragraph 4.3(iv).

We submit that the threshold be set by the FI itself in view of the varied size of operations of each FI. In any event, we note that there will be some difficulties in operationalising this across the industry as each FI would have differing thresholds

based on the size and nature of their business, and it is challenging to keep track of which individuals handle such small payment as there might be changes to their roles.

Question 3. MAS seeks comments on (i) the period, i.e. for the past five years, for which reference check information should be sought and furnished

We support the proposed period of the past five years, for which reference check information should be sought and furnished. However, we expect that FIs will need to give further consideration to the relevance of the information over that time period in relation to its impact on a hiring decision. For example, a more recent disciplinary action may hold more weight.

We further support that the lookback period be based on the number of calendar years and not years of employment.

We seek MAS' confirmation that FIs are only required to furnish the mandatory information relating to an individual's records for the past five years, even if the individual has been employed with the FI for more than five years.

For consistency and to help FIs simplify processes and reduce operational burden, we respectfully suggest that MAS could also align the requirement for individuals (e.g. representatives, directors etc.) to declare their responses to the questions relevant to the fit and proper criteria (as set out under the MAS Guidelines on Fit & Proper Criteria) relating to the past 5 years, instead of the past 10 years as set out in circulars and Forms such as the MAS Circular CMI 01/2011 Due Diligence Checks and Documentation in Respect of the Appointment of Appointed, Provisional, and Temporary Representatives in relation to Form 3A and Form 11 - Appointment of Chief Executive Officer or Director / Change of Director's Nature of Appointment from Non-Executive to Executive etc. Please also see our response to Question 5.

Question Q3(ii). MAS seeks comments on the mandatory information FIs are required to provide in response to reference check requests for individuals who fall within the scope of these requirements under Section 4

General comments

By way of general comments, we are concerned with the proposed requirement of FIs to respond to reference check requests. FIs will need to retain and disclose individual employee confidential information to a third party that is not a government entity (specifically, we are concerned with the provision of the information proposed in paragraph 5.3(b) of the Consultation Paper). We submit that this is far above and beyond what is necessary for the intent of the policy. Instead of having to provide the compliance

records as set out at paragraph 5.3(b) of the Consultation Paper, we propose that FIs be required to respond to the question: *“at time of termination, did the firm regard the individual as meeting the MAS Fit and Proper Criteria as set out in FSG-G01?”*

Compliance records relating to individual' s fitness and propriety

Without prejudice to our submission that the compliance records should not be required to be provided by FIs, our specific comments on the compliance records set out in paragraph 5.3(b) of the Consultation Paper are as follows:

- (a) in relation to paragraphs 5.3(b) (i), (ii), (iii) & (v), we seek clarification on the definition of consumer detriment. In this regard, we submit that FIs not dealing with retail customers should be exempted from having to provide records relating to consumer detriment;
- (b) given we need precision on the compliance records (misconduct, investigations etc) that are to be disclosed, we submit that there needs to be a threshold of materiality in relation to the compliance records. Accordingly, FIs should only be required to disclose “material” compliance records;
- (c) in relation to ongoing investigations, we agree that FIs should only need to provide compliance records relating to an ongoing investigation if there is reasonable evidence of wrongdoing attributed. Hence, if the ongoing investigation does not provide any reasonable evidence of wrongdoing by staff, FIs should not be obliged to provide the information to the prospective employer;
- (d) we seek clarification on the definition of 'ongoing investigation';
- (e) for ongoing investigations which are only concluded after the information request was given to the prospective employer, FIs should not be obliged to inform the prospective employer if it turns out that there was wrong-doing by the staff, or there should at least be a cut-off period to provide updates to prospective employers as this imposes extra operational burden on FIs to track and provide further follow-up responses to prospective employers;
- (f) we seek clarification that the investigations, misconduct reports and disciplinary actions (as referred to in paragraph 5.3(b) of the Consultation Paper) must relate to an employee's fitness and propriety;
- (g) the term 'wrongdoing' is too broad. Instead, we respectfully submit that 'wrongdoing' should be restricted to reportable misconduct or breach of legal or regulatory requirements administered by MAS while performing duties or responsibilities as an employee of the FI. Alternatively, we submit that MAS should

leave it to the discretion of FIs to use their internal disciplinary framework and matrix to define wrongdoing and its severity; and

- (h) we note that compliance records relating to the individual's fitness and propriety includes 'incidents where the FI has knowledge of, or reasonable grounds to believe that the individual has or may have been in breach of legal or regulatory requirements administered by MAS or any other law'. We respectfully submit that the way it is drafted assumes that everything an employee does while performing his duties has a bearing or more bearing on his fitness and propriety while the same thing he does while not performing his duties does not have a bearing or has less bearing on his fitness and propriety. This assumption can be problematic.

For example, if the employee was driving together with a member of his team as a passenger on the way to a business meeting/dinner and was caught speeding it is arguably reportable (because it is a breach of another law while performing his duty), but if he was driving home after work and was caught speeding it is not reportable (simply because the breach did not occur while performing his duties). Another example: an employee caught not making a customs declaration while on a business trip is arguably reportable, but if he did the same while on a non-business trip it is not reportable.

There could be many other instances where the breach of "other law", even when it was made while performing his duties, has no bearing or no more bearing on an employee's fitness or propriety than when it was done while he's not performing his duties.

Based on the above, we submit that MAS amend the mandatory information to be provided to only when a breach is a breach of any other law while performing his duties or responsibilities as an employee of the FI and which has a bearing on his fitness and propriety.

We also seek MAS' clarification as to whether 'any other law' is intended to be the law of any jurisdiction or the laws of Singapore.

Disclaimer

We note that HR systems will generally capture an individual's title and department and relevant dates associated with those, but not more detailed content on the role itself. To require validated content on every job role of every employee would require significant and costly operational changes and additional human resources given the increased workload. This would also increase the amount of time required to provide accurate references. The same record keeping issue applies for fitness and proprietary records/balanced scorecard grades. Accordingly, we urge MAS to give FIs the ability to

include a disclaimer if they do not have records for the period prior to the mandatory reference requirements coming into effect.

Roles and functions

We seek clarification from MAS regarding the "roles and job functions of the individual (including last position held)" (paragraph 5.2(a)(ii) of the Consultation Paper). For example, does MAS expect all the roles and job functions throughout the individual's employment to be listed out? If so, this may be very challenging for the FI.

Disciplinary actions

We are supportive of including disciplinary actions within the scope of the mandatory information to be provided for reference checks. In this regard and as previously submitted above, we strongly urge MAS to consider that standards of materiality be adopted with respect to 'disciplinary actions' as set out in paragraph 5.3(b)(iv) of the Consultation Paper (e.g. material disciplinary actions taken against the individual or would have been taken against the individual if the individual was still with the FI (where applicable)).

We would also appreciate clarification as to the following:

- (a) in relation to remuneration, can MAS provide clarification as to whether a reduction in remuneration as a result of the performance of the individual, economic conditions, or even a change in role or responsibilities would fall within the scope of matters to be disclosed;
- (b) whether verbal warnings are included or excluded from the scope of disciplinary actions to be provided for reference checks;
- (c) whether asking employees to take paid or unpaid leave for risk management reasons while carrying out an investigation would constitute disciplinary action and need to be disclosed. Given that this request would occur before the conclusion of an investigation, we of the view that such leave is not a form of disciplinary action; and
- (d) what is the extent/level of disciplinary actions to be included? Can FIs decide on the level of granularity of information to provide in relation to disciplinary actions? We are of the view that disciplinary actions taken should exclude verbal warnings as referred to above and be calibrated to include those involving docking of salary, suspension of duties, impact on bonus, etc. The compliance records should focus on the outcome of the FI's meting out of punishment rather than the offence itself. For instance, an offence committed by a junior staff might not have the same outcome as a similar offence by a senior management. Thereafter, incidents on

potential breach of requirements should be calibrated towards a perspective of incidents where it is likely to suffer a meaningful disciplinary action.

Balance scorecard grades

The "last four balanced scorecard grades assigned to the individual (where applicable)" (paragraph 5.3(c) of the Consultation Paper): we seek clarity as to what this means, i.e. does this refer to the last four performance ratings which includes mid-year, final year (meaning two years' ratings) or only final year ratings (meaning four years' ratings)?

Template

We respectfully submit that MAS should prescribe a template for the mandatory information to be provided for reference checks. A template will help to align responses within a framework to enable easier interpretation of responses.

Reasons for cessation of employment

We refer to paragraph 5.3(a)(iii) for FIs to furnish the "reason for the cessation of employment". For consistency, we respectfully submit that MAS should align the reasons for the cessation to those currently set out under Form 8/ 10 - Notification for the Cessation of a Representative in any or all of the Regulated Activities under SFA/ of the Financial Services under FAA.

Question 3(iii). MAS seeks comments on the timeline of 21 calendar days for responding to reference check requests

We submit that 21 calendar days is too short a timeframe and one month/28 calendar days would be more appropriate. One month would be more aligned with international standards – for example, the UK FCA requires FIs to provide references within six weeks of a request. In Hong Kong, the HKMA has proposed a timeline of one month for its mandatory reference checking scheme.

In this regard, we note that more time is required because, among other reasons, the mandatory information may need to be compiled manually where it is not captured by the FI's human resources system and it may not be readily at hand (i.e. it could be stored in the FI's archives). Moreover, larger firms would likely receive numerous requests and significant resources would need to be deployed by all firms to compile and review the information to be provided, particularly where such information had not come into existence with such disclosure in mind.

We seek clarification as to whether a prospective employer will generally be considered to have discharged its obligations after waiting for one month and there is no response from the former employer.

Unforeseeable delays

We seek clarification from MAS in cases where there is an unforeseeable delay in the reference check request being complied with (for example, where the request is sent to the employee's previous line manager who is on block leave and the appropriate department (i.e. HR) is only made aware of the request when that manager returns two weeks later), whether MAS would take such circumstances into account when considering whether there has been any breach of the proposed prescribed timeline.

By way of a suggestion, it would also be helpful if a list of FIs' contact details for reference check purposes could be maintained by MAS or an industry group (as appropriate).

Question Q3(iv). MAS seeks comments on the right for individuals to view the references prepared, including potential challenges in operationalising such a requirement and any suggestions on how this requirement could be implemented.

We submit that the right to view should only be limited to instances where there is a misconduct report filed with MAS against the individual. In particular, it should be limited to the viewing of the misconduct report to ensure that the report correctly reflects the misconduct. Should this not be the case, we submit that there will be huge challenges on FIs to operationalize such a requirement to allow individuals to view *all* references prepared.

Further, given that the individual will have the right to view the references prepared, we foresee that there could be situations of disputes or challenges on the information provided in a reference check. This may potentially result in disputes and litigation. As such, we seek clarification as to MAS' expectation on whether there will be an obligation by the FI to provide further clarification/help in resolving the dispute.

Question 4. MAS seeks comments on the approach to hiring from companies located outside Singapore, non-financial sectors or FIs in Singapore but outside the scope of FIs described in paragraph 3.1.

We note that FIs are expected to take 'reasonable steps' to request relevant information in such instances, and satisfy themselves of the fitness and propriety of the prospective employees. We seek clarification and examples of what would constitute 'reasonable steps' that would be considered sufficient by MAS. In this regard, it is important for the updated MAS Notice (if MAS were to make these requirements mandatory via a Notice to FIs) to set out what would constitute reasonable steps. Alternatively, MAS Guidelines/FAQs with illustrated examples of steps which are 'reasonable steps' would be helpful to FIs.

We also seek clarification in relation to the scenario where an FI proposes to hire an employee who worked at a MAS-regulated FI (i.e. an FI that is required to comply with the

reference check requirements) and that FI fails to respond to a reference check request or the FI's response is insufficient. Can the prospective employer adopt the same approach as for hiring from non-MAS regulated entities/entities located outside Singapore (i.e. make an assessment of the individual's fitness and propriety based on other available information and due diligence conducted etc, provided reasonable steps have been taken to conduct the reference check)?

As previously stated, and considering the complexity around the reference check scheme, we submit that MAS should limit the approach to hiring to FIs in Singapore within the scope of FIs described in paragraph 3.1 of the Consultation Paper.

Question 5. MAS seeks comments on the requirement to maintain records specified in paragraph 5.3 for all employees, with the exception of ancillary service personnel such as drivers, food and beverage personnel and clerical personnel, for a minimum period of five years.

We are concerned that this requirement to maintain records specified in paragraph 5.3 for *all* employees (excluding ancillary service personnel), is too extensive and onerous. The compliance and human resources costs would be astronomical. As such, we respectfully submit that the requirement to maintain records for a minimum period of five years be limited to employees currently in functions as set out under Option 2 in paragraph 4.4. of the Consultation Paper (as modified per the comments above in response to question 2), and with discretion left to FIs to decide if they wish to expand the maintaining of records to all employees.

Without prejudice to our submission above, we seek clarification as whether external consultants (hired by third party vendors) or temporary staff such as contractors and interns, are in scope on the requirement to maintain records.

Lookback period of other declarations and Forms

With reference to the MAS Circular on "Due diligence checks and documentation in respect of the appointment of appointed, provisional and temporary representatives", we note that individuals are expected to provide the self-declaration against the fit and proper criteria for the period of the past ten years. As proposed in our response to Question 3(i), we respectfully suggest that MAS could align the fit and proper self-declaration with the mandatory reference check lookback period and consequent record keeping obligations, by reducing the relevant period from the past ten years to the past five years accordingly. This would ensure consistency and help FIs simplify processes and reduce operational burden.

In addition, regulatory Forms such as Form 3A and Form 11 require certification from the principal/ licensed entity that the principal/ licensed entity has conducted due and diligent enquiry on the background of the appointee based on, amongst others, (i) the appointee's

response in the fit and proper criteria section of Form 11 and (ii) the above-mentioned self-declaration Form for completion by Form 3A appointees and where these Forms require appointees to respond to all the questions for a period of “within the past 10 years”. Again, we respectfully suggest that MAS could align the relevant period in these Forms with the mandatory reference check lookback period and consequent record keeping obligations, by reducing the relevant period from within the past ten years to within the past five years accordingly.

Question 6. MAS seeks comments on the requirements for FIs to establish robust internal investigation and disciplinary processes to facilitate the provision of fair and accurate responses to reference check requests.

We seek assurance that MAS has taken into account any data privacy considerations before requiring the FI to release such information derived from internal investigations and/or disciplinary actions taken.

Question 7. MAS seeks comments on the mode of implementation of the requirements proposed in this paper.

ASIFMA members hold differing views as to whether the requirements proposed should be implemented by way of a Notice or Guidelines.

Question 8. MAS seeks comments on the transitional period of six months to implement the requirements proposed in this paper.

Six months is too short a timeframe for the industry to implement the requirements proposed in the Consultation Paper. A longer transitional period is required to take into account that the industry is currently still implementing and in the transitional period for various other major regulatory changes, which were recently issued by MAS (e.g. Notice on Execution of Customer’s Orders, IAC Guidelines and Guidelines on Environmental Risk Management etc). Accordingly, we seek a transitional period of at least 12 months.

Further, we seek clarification on the application of the transitional period. For cases where a letter of offer has been issued before the end date of the transitional period but the background check has not been conducted, would the FI be expected to comply with the mandatory reference check requirements?